

The Indiana Prosecutor

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In this issue...

Recent Decisions

<i>Packer v. State</i>	1
<i>Forbes v. State</i>	2
<i>Black v. State</i>	2
Governor's Veto Held Constitutional	3
<i>U.S. v. Banks</i>	3
<i>Maryland v. Pringle</i>	4
Association Elects Officers for 2004	5
IPAC 2004 Calendar Announced	5
Dan Sigler Honored with Shine Feller Award	5
IPAC to Employ Traffic Safety Resource Prosecutor ..	6
Mark Your Calendars Now Trial Advocacy Course ...	6
NAC Announces Spring Course Offerings	7
Crime Stoppers Month	7
Positions Available	7
Calendar of Events	8
Sponsors	9
Winter Conference Pictures	10



RECENT DECISIONS

TELEPHONE CONVERSATION FROM JAIL ADMISSIBLE

Packer v. State

___N.E.2d___

(Ind. Ct. App. 11/19/03)

Aaron Packer was convicted of killing his girlfriend's lover. During telephone conversations with his girlfriend, made while Packer was incarcerated in the St. Joseph County Jail, the defendant discussed his plan to blame another man for the murder. Those calls from the jail were recorded. At Packer's trial, over the defendant's objection, some of those recorded telephone conversations were admitted into evidence.

The sole issue on appeal was the defendant's contention that the trial court had erred in admitting the taped conversations. The defendant argued that the introduction of the recorded telephone conversations from the jail violated both the Federal and Indiana Wiretap Acts.

While incarcerated, Packer received an inmate handbook. He acknowledged receipt of that handbook when he signed the jail's Initial Classification Screening Form. A rule in the handbook advised that all telephone calls made from the St. Joseph County jail were subject to monitoring and recording. Further, when a telephone call was made from the jail a recorded announcement played informing the parties that the call was being recorded and monitored.

The Federal Wiretap Act recognizes as an exception to the general rule excluding from evidence recorded telephone conversations, calls that are taped in the ordinary course of business. This exception, the Court of Appeals concluded, applies to taped telephone conversations from a jail. In that Packer's conversation was recorded during the ordinary course of business at the St. Joseph County jail, the court held that these recordings fell within this recognized exception. The trial court did not, therefore, abuse its discretion in admitting Packer's telephone conversations into evidence under a Federal Wiretap Act analysis.

Neither did the taped conversations violate the Indiana Wiretap Act, the Court of Appeals concluded. The contents of the tape recordings were admissible under an Indiana Wiretap Act analysis, the Court said, in that they did not qualify as "interceptions." Under the Indiana Wiretap Act the recording of a telephonic or telegraphic communication is not an "interception" if it is done with the consent of either the sender of the receiver

of that communication. Packer consented to the recording of his telephone conversation from the jail when he acknowledged receipt of the jail handbook, the Court said. Packer's convictions were affirmed.



FORBES ORALLY ARGUED BEFORE SUPREME COURT

Oral argument was heard by the Indiana Supreme Court on Tuesday, December 16, 2003, in the case of *Forbes v. State*. This is the case in which the Court of Appeals raised *sua sponte* the issue of the applicability of the Uniform Act to Secure Attendance of Witnesses from Without the State to the process utilized by the Orange County Prosecutor to obtain Defendant Forbes' blood test results from a Kentucky hospital. The Court of Appeals held that since the procedures of the Uniform Act were not followed and the three-part reasonableness test of *See v. City of Seattle* were not met, the test results were inadmissible.

The State argued Tuesday that the statute which allows a prosecutor or defendant to compel an out-of-state witness to appear or to produce documents does not confer any Fourth Amendment rights upon a defendant. Forbes, therefore, the State argued, had no standing to contest the procedure by which his blood test results were obtained from an out-of-state hospital. Defense counsel did not raise the issue of the applicability of the Uniform Act at the suppression hearing or in his brief filed with the Court of Appeals.

The State also argued that even if the defendant did have standing, the subpoena used to obtain the blood test results in the *Forbes* case did meet the reasonableness test set forth in *See v. City of Seattle*. In that the subpoena to the Kentucky hospital was issued approximately 10 days prior to the *Oman* decision, the requirements necessary to validate a prosecutorial subpoena set forth in that case did not apply in *Forbes*.

The anticipated decision of the Supreme Court in this case is of great import to Indiana prosecutors.

Following Tuesday's oral argument the Supreme Court announced that it would soon decide whether to grant transfer. The State filed a petition to transfer soon after the original opinion was published.



INDIANA SUPREME COURT GRANTS TRANSFER IN *BLACK v. STATE*

IPAC was advised by the Office of the Attorney General that the Indiana Supreme Court has granted transfer in the case of *Black v. State*, decided in September, 2003. This was the opinion in which Judge Barnes set the record straight with regard to the application of the automobile exception to the warrant requirement of the 4th Amendment of the U.S. Constitution. In other opinions by the Court of Appeals, the Court had suggested that if a car was readily mobile at the time it was stopped by law enforcement but was subsequently immobilized by impound or otherwise, police officers needed to get a warrant before searching that vehicle. In the *Black* opinion, authored by Judge Michael Barnes, the Court said that if a vehicle is readily mobile at the time it is initially stopped, a warrantless search of that vehicle is warranted under the automobile exception even if the vehicle is subsequently immobilized by the actions of law enforcement.

A grant of transfer voids the *Black* opinion until such time as the Supreme Court renders its opinion in this case.

